Supreme Court, U.S.
APR 2 9 1992
OFFICE OF

No. 91-1415

In the Supreme Court of the United States

OCTOBER TERM, 1991

SIDNEY S. LOXLEY, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

JUDITH D. HEIMLICH
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

1. Whether the administrative law judge's determination that petitioner's charges for health care services exceeded the charges prevailing in the community for the same or similar services was supported by substantial evidence.

2. Whether the court of appeals properly allocated the burden of proof to petitioner on the issue of whether petitioner's charges for health care services exceeded those prevailing in the community for the same or similar services.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	13

TABLE OF AUTHORITIES

Statutes and regulations:

- Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*:
  - 33 U.S.C. 907(a) 6
  - 33 U.S.C. 907(b) 7, 8
  - 33 U.S.C. 907(g) 2, 7, 8, 10, 11
- 5 U.S.C. 556(d) 12
- 20 C.F.R.:
  - Section 702.132 6
  - Section 702.413 ..... 2, 7, 8, 9, 11
  - Section 702.414 ..... 3, 7, 8
  - Section 702.416 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1415

SIDNEY S. LOXLEY, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 934 F.2d 511. The decision and order of the Benefits Review Board (Pet. App. 29-53) is reported at 23 Ben. Rev. Bd. Serv. (MB) 215. The decision and order of the administrative law judge (Pet. App. 56-117) is reported at 20 Ben. Rev. Bd. Serv. (MB) 6.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1991. A petition for rehearing was denied on July 17, 1991 (Pet. App. 54-55). The peti-

tion for a writ of certiorari was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985, petitioner, a board certified orthopedic surgeon, provided medical care to ten employees of respondent Newport News Shipbuilding and Drydock Company (NNS) for work-related injuries (Pet. App. 59, 68).[1] NNS refused to pay the full amount petitioner billed for three categories of charges because it believed the charges exceeded the prevailing rate in the community, which is the amount allowable under the Longshore and Harbor Workers' Compensation Act (LHWCA). See 33 U.S.C. 907(g).[2] NNS computed the prevailing rate based on the procedure it used to determine benefits under its employee health care plan (Pet. App. 3-5).

NNS's health care plan covers 77,000 employees and their dependents (Pet. App. 4). Under its plan, NNS pays the full amount of an insured's medical expenses so long as those expenses "did not exceed the 80th percentile of charges for that particular service" during the prior year (*id.* at 4-5 & n.3; see *id.* at 60); charges in the highest 20% are considered to exceed the prevailing rate (*id.* at 60-61). The services rendered are identified by a uniform coding sys-

[1] Dr. Lawrence D. Bourgard, an orthopedic surgeon in petitioner's group practice, also charged for medical care rendered to the employees (Pet. App. 56 n.1). Although Dr. Bourgard was a party in the proceedings below, he is not a party before this Court (Pet. 5 n.1).

[2] The LHWCA limits fees payable for medical services "to such charges as prevail in the community for such treatment." 33 U.S.C. 907(g); see also 20 C.F.R. 702.413.

tem known as Current Procedural Terminology (CPT codes), which was adopted by the American Medical Association and is widely used by insurers and physicians, including petitioner, to designate medical, surgical, and diagnostic services (*id.* at 4 & n.2, 13, 68). In determining the 80th percentile for each CPT code in 1985, NNS relied on 1984 charges billed to its plan (*id.* at 78). For the three services at issue in this case, the data consisted of more than 46,700 charges submitted by approximately 1,700 physicians, representing more than 70% of the physicians in the applicable geographic area (*id.* at 15, 34 n.3, 99-100 n.9). CPT codes for the disputed charges, and therefore NNS's payment system, do not differentiate according to specialty of the physician providing the care (*id.* at 6, 13, 67-68). However, "the CPT code system allows for the use of modifiers," and "[b]y using a modifier, a physician can indicate that a particular service was altered in some respect even though its code number was not changed" (*id.* at 14 n.7).

For the charges disputed in this case, petitioner billed $38.50 (intermediate office visit for established patient, CPT code 90060); $52 (extended office visit for established patient, CPT code 90070); and $122 (initial hospital care, CPT code 90220) (Pet. App. 61, 66). In accordance with its plan, NNS paid petitioner at the 80th percentile for each service, resulting in payments to petitioner of $25, $35, and $110, respectively, for each service (*id.* at 5, 61).

2. Petitioner complained of the payment shortfall to the Director of the Office of Workers' Compensation Programs. See 20 C.F.R. 702.414. After an evidentiary hearing requested by NNS, an administrative law judge held that NNS's standard payments accurately represented the prevailing charges in the Hampton Roads, Virginia, community (Pet. App. 38

& n.7, 95), and that petitioner therefore was not entitled to payment of the disputed charges above those rates (*id.* at 114-115). In reaching that conclusion, the ALJ emphasized the extensiveness of NNS's survey data, which included a large number of charges submitted by a high percentage of area physicians (*id.* at 98-99, 110). Observing that other private and governmental medical insurers cut off payment at the 75th to 90th percentile, the ALJ deemed reasonable NNS's "standard which accepts as being within the [prevailing community rate] 4 out of 5 charges received for the same or a similar service" (*id.* at 82, 109-110).

The ALJ rejected petitioner's contention that NNS's methodology was flawed because it failed to distinguish among specialists, particularly orthopedic surgeons who, according to petitioner, charged more for their services than general care physicians (Pet. App. 97-98). Relying on data compiled by NNS for the administrative hearing, the ALJ noted that for two of the three disputed charges, NNS's payment to petitioner was greater than it would have been had payment been based solely on charges by orthopedic surgeons (*id.* at 98-99). The ALJ viewed this result as indicating that the charges of specialists were well represented in NNS's broad data base, enhancing the reliability of NNS's payment methodology (*id.* at 99-100). In addition, the ALJ concluded that the medical profession's use of CPT codes to designate services indicated that "no significant differences in services" existed in the "same CPT code designation" (*id.* at 100).[3]

---

[3] The ALJ also noted that Blue Cross/Blue Shield likewise based its payments on charges submitted for the prior year and did not distinguish among specialties (Pet. App. 71-72,

In contrast to the persuasiveness of NNS's evidence, the ALJ found the testimony of petitioner and his one witness, Dr. Gervas S. Taylor, unconvincing as to the prevailing community charges for the three disputed codes (Pet. App. 104). Petitioner did not know the fees his own group or others charged for services,[4] nor did he present any basis for challenging NNS's use of the 80th percentile in setting payments (*id.* at 72, 102). Dr. Taylor, an orthopedic surgeon practicing in the community, served as chairman of a medical peer review committee that considered claims by insurers that medical charges were unreasonable (*id.* at 73). But like petitioner, Dr. Taylor was unfamiliar with the fees charged by his own orthopedic surgery group for the three disputed services (*id.* at 74, 103). Nor did the peer review committee during his tenure have occasion to review the fees of any local orthopedic surgeon (*ibid.*).[5]

Finally, noting that the LHWCA is silent on the issue (Pet. App. 86), the ALJ placed the burden of

---

82). He further stated that if petitioner believed "his services are more intensive, extensive or skilled than the more common run of his fellow physicians," he could use the "modifiers" included in the CPT system to designate those services (*id.* at 101; see *id.* at 67).

[4] The ALJ recognized that physicians may be hampered by antitrust laws in gathering pricing information from their professional peers (Pet. App. 103-104).

[5] Dr. Taylor did not object to use of the 80th percentile to set payments, and thought his committee would approve that payment level (Pet. App. 76). Although Dr. Taylor thought that the charges of specialists should be segregated out of the data base, he opined that a "specialist" included physicians who were board eligible as well as board certified (*id.* at 76-77), and acknowledged that it was difficult to determine who was board eligible (*id.* at 77).

proof on the prevailing rate issue upon petitioner, as the party "seeking an order requiring payment of his charges in full for services rendered" under the Act (*id.* at 93). The ALJ stated, however, that "the end result would have been the same" regardless of which party bore the burden of proof (*id.* at 105).[6]

3. The Benefits Review Board reversed (Pet. App. 53). The Board held that NNS bore the burden of proving that petitioner's fees exceeded the prevailing community rates, and concluded that NNS's evidence was insufficient to sustain its burden (*id.* at 46-47). In the Board's view, NNS's payment methodology failed accurately to depict prevailing community rates because NNS computed payments based solely on charges submitted to its own health care plan, and did not consider charges billed to other insurance plans in the area (*id.* at 48, 50).[7] The Board also faulted NNS for using fee data from the previous year (*id.* at 49-50). In addition, the Board ruled that the 80th percentile cut-off for payment, while a proper subject of negotiation with the union, violated the employer's obligation under the LHWCA, 33 U.S.C. 907(a), to furnish all medical and surgical treatment to em-

---

[6] The ALJ relied on the general principle that the party seeking to establish the affirmative of an issue bears the burden of proof (Pet. App. 87). As further support, he analogized petitioner's claim to that of a physician seeking to recover fees in a state civil court action (*id.* at 88-90), and to an attorney seeking fees under the LHWCA, 20 C.F.R. 702.132, or a civil rights statute (Pet. App. 91-92), all circumstances in which the proponent bears the burden of proof.

[7] The Board intimated that physicians might limit their charges to the amount known to be reimbursable under a particular plan (Pet. App. 48), thus skewing the data base, but the Board referred to no evidence supporting that theory.

ployees suffering a work-related injury (Pet. App. 49).

Finally, the Board decided that NNS's failure to distinguish by specialty rendered its methodology "inherently flawed" and contrary to the LHWCA's requirement that fees be limited to charges prevailing in the community for " 'the same or similar' care" (Pet. App. 50-52). See 33 U.S.C. 907(b) and (g); 20 C.F.R. 702.413, 702.414. And the Board dismissed NNS's specific survey of charges by orthopedic specialists because the sample was "quite limited" and, again, based exclusively on charges submitted to NNS's plan (Pet. App. 52).

4. The Fourth Circuit reversed the judgment of the Benefits Review Board and affirmed the ALJ's judgment (Pet. App. 2). Noting that the ALJ's factual findings are "conclusive upon the Board" (*id.* at 8), the court held that the Board had "erroneously expanded its scope of review by its independent analysis of the facts" (*id.* at 9). It further concluded, based on the record in this case, that petitioner "did not offer sufficient evidence to prove that his charges fell within the prevailing rate" (*id.* at 22).

The court agreed with the ALJ that NNS's data were representative of prevailing charges (Pet. App. 9-10). In the court's view, the breadth of NNS's data base also rendered inconsequential the fact that the data were derived from NNS's negotiated health plan and included no data from other health plans (*id.* at 10, 14-15). The court stated that to require a "more-encompassing survey of medical fees" would impose on employers a "cumbersome, indeed prohibitive, burden" (*id.* at 15).[8]

---

[8] The court did not think that NNS's reliance on the previous year's charges undermined NNS's methodology. The court

Because the employer's obligation under the Act is limited to paying the charges prevailing in the community, the court rejected the Board's conclusion that using the 80th percentile standard violated the Act's requirement that the employer furnish all medical care for work-related injuries (Pet. App. 10). The court also rejected the Board's ruling that the NNS's approach violated the statutory prescription that the prevailing rate be for the "same or similar care" because NNS did not differentiate by specialty (*id.* at 11-12). See 33 U.S.C. 907(b) and (g); 20 C.F.R. 702.413, 702.414. Noting that the uniform CPT codes, by definition, designate "same or similar" services, and that both the Act and the regulations discuss comparable treatment without distinguishing between medical providers, the court concluded that the "use of the CPT codes is sufficient to define 'same or similar care' under the Act" (Pet. App. 13-14).[9]

In affirming the ALJ's conclusion that petitioner's "charges exceeded the prevailing rate regardless of who carried the burden of proof," the court recognized that it "need not decide on whom the burden falls in disposing of this appeal" (Pet. App. 17). Nonetheless, the court stated that the burden of proving prevailing community rates is upon the "physician who seeks an order compelling full payment of his charges" (*id.* at 17, 18). Although NNS had re-

---

recognized that Blue Cross/Blue Shield also uses data from the prior year, and questioned whether the use of data from the prior month would produce a valid sample (Pet. App. 15 n.8).

[9] The court also referred to Dr. Taylor's testimony evidencing the difficulty in defining who is a specialist, and to the availability within the CPT codes of a modifier to indicate that special services were rendered (Pet. App. 14 n.7).

quested the administrative hearing, the court reasoned that petitioner was the party on whom the burden of proof properly fell because he had "initiated proceedings to clarify whether his rate was within the prevailing rate" (*id.* at 19-20). In addition, the regulation governing the resolution of fee disputes under the Act identifies the service provider and the Director, but not the employer, as "necessary parties" to a formal hearing (*id.* at 21). See 20 C.F.R. 702.416. The court concluded that the burden of proof should not fall upon a party who is not even required to participate in the proceedings (Pet. App. 21).

Judge Widener dissented, stating that NNS's use of data encompassing all physicians' fees rather than the fees of orthopedic surgeons violated the requirement of 33 U.S.C. 907(g) and 20 C.F.R. 702.413 that charges be limited to those prevailing in the community for the same or similar services (Pet. App. 26-27). He also noted that while physicians' charges under the LHWCA are subject to regulation by the Secretary of Labor, "it is not true that physicians' charges are subject to regulation by Newport News and the employees' union" (*id.* at 27). Finally, because NNS requested a hearing before an ALJ, Judge Widener deemed NNS to be the "proponent" of the issue and would have allocated to it the burden of proof (*id.* at 25-26).

ARGUMENT

1. Petitioner states that his "primary argument * * * is that the employer's fee schedule is illegal" (Pet. 22). He further contends that review is warranted because this case "is the only reported judicial decision construing the prevailing rate limitation on medical fees under the Act" (Pet. 11). To the contrary, the court of appeals' fact-based holding is unlikely to have a significant impact on medical providers. Therefore, further review is not warranted.

The court of appeals applied the proper standard of review in this case and correctly affirmed the ALJ's findings as supported by substantial evidence (Pet. App. 2). As the court recognized (*id.* at 22; see also *id.* at 98), the only issue before the ALJ was whether, based on the factual record in this proceeding, petitioner's charges were within prevailing community rates pursuant to 33 U.S.C. 907(g). The ALJ and court of appeals correctly rejected each of petitioner's contentions as to why NNS's methodology for determining prevailing rates was deficient—*i.e.*, petitioner's arguments that NNS erred by relying on the previous year's charges, by failing to differentiate by specialty, and by using the 80th percentile to represent prevailing charges. The use of the previous year's charges—which reflected the rates charged by more than 70% of the physicians in the area—yielded a large and reliable data base. Based on this information, NNS compensated petitioner at a rate acceptable to 80% of his fellow physicians in the same geographic area for the same kind of services. Moreover, the CPT codes by definition encompass "same or similar" services, and were the most readily available means to categorize medical services.

Thus, NNS's methodology for determining prevailing community rates, which is consistent with prac-

tices in the health insurance industry, is entirely reasonable. In the absence of specific guidance from the statute or the regulations as to how "prevailing" charges for "same or similar" services are to be determined, the court correctly upheld as supported by substantial evidence (Pet. App. 16) the ALJ's conclusion that NNS's concededly "extensive" evidence (Pet. 8) established prevailing community rates.

Furthermore, contrary to petitioner's assertion (Pet. 12), the court did not rule that "as a matter of law, this type of statistical data [derived from an employer's health plan] defines the prevailing rate for medical services under the Act," nor did the court "authorize[] any employer covered by the Act to implement its own mandatory fee schedule" (*ibid.*). Rather, this case presents a straightforward application of a statutory standard—charges prevailing in the community—to the particular facts of the case. Particularly in view of the "paucity of decisions" addressing medical fees under the LHWCA (Pet. App. 82-83; see Pet. 11), the ALJ's fact-intensive determinations do not merit further review.[10]

2. The court of appeals' discussion as to which party bears the burden of proof is dicta. This Court

---

[10] Petitioner implies (Pet. 15-16) that a provider's fees are permissible if they merely comport with his customary fees. But the regulations provide that fees must be limited to prevailing community charges "*and* shall not exceed the customary charges of the medical care provider for the same or similar services." 20 C.F.R. 702.413 (emphasis added); see 33 U.S.C. 907(g). Although it appears that petitioner accepted lower fees for Medicaid patients and patients covered by agreements with several Health Maintenance Organizations (Pet. App. 70-71)—so that there was a question as to whether petitioner's charges to NNS represented his customary charges—the ALJ ruled only that petitioner's charges exceeded the prevailing community rates (*id.* at 37).

need not decide which party bears the burden of proof because allocation of the burden would not affect the outcome of this case.

The tribunals below agreed that "the proponent of a rule or order has the burden of proof," 5 U.S.C. 556(d), but differed on the application of that principle here (Pet. App. 19, 47, 87). Although the ALJ allocated the burden of proof to petitioner, he specifically stated that his ruling in favor of NNS would have been the same regardless of which party bore the burden of proof (*id.* at 105). Because the ALJ found (*id.* at 104) that "the testimony of [petitioner and his witness] fell far short of establishing" the charges that prevail in the community, while the evidence submitted by NNS was "persuasive" (*id.* at 105-112), the result in this case would have been the same even if the burden of proof rested with NNS (*id.* at 105).

Although the Board concluded that the burden of proof fell on NNS and that NNS's evidence failed to satisfy that burden (Pet. App. 46-47, 52), the Fourth Circuit affirmed the ALJ's conclusion that regardless of which party bore the burden of proof, petitioner's charges exceeded the prevailing community rates (*id.* at 16-17). The court recognized that it "need not decide on whom the burden falls in disposing of this appeal," but proceeded to state its view that petitioner bore that burden (*id.* at 17). Since the outcome of this case does not turn on the resolution of the burden of proof issue, and there is no conflict in the circuits on the issue, this Court need not consider the issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARSHALL J. BREGER
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

STEVEN J. MANDEL
Deputy Associate Solicitor

JUDITH D. HEIMLICH
Attorney
Department of Labor

APRIL 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45419